Supreme Court, U.S.
FILED
DEC 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-1105

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF ARKANSAS ..... *Petitioner*

VS.

MICHAEL EUGENE MAYFIELD ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

*JOHN STEVEN CLARK
Arkansas Attorney General

BY: WILLIAM FRED KNIGHT
Assistant Attorney General
201 EAST MARKHAM STREET
HERITAGE WEST BUILDING
LITTLE ROCK, ARKANSAS 72201
(501) 371-2007

Counsel for Petitioner
**Counsel of Record*

ARKANSAS LEGISLATIVE DIGEST, INC.

QUESTION PRESENTED

WHETHER THE SUPREME COURT OF ARKANSAS MISCONSTRUED *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966), WHEN IT FOUND THAT THE POLICE OFFICER'S WARNING TO MAYFIELD THAT HE HAD THE RIGHT TO EITHER RETAINED OR APPOINTED COUNSEL WAS INADEQUATE TO APPRISE THE DEFENDANT OF HIS RIGHT TO APPOINTED COUNSEL WITHOUT COST TO HIM.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

This Court should grant certiorari because the Arkansas Supreme Court's ruling that Mayfield's *Miranda* warnings failed to adequately inform him that he could have an attorney present even if he could not afford one is inconsistent with the decisions of other state courts and the decision of this Court in *Prysock v. California*, 453 U.S. 355 (1981).

CONCLUSION 9

APPENDIX A ..... A-1—A-9

TABLE OF AUTHORITIES

CASES: Page

Burton v. State, 260 Ind. 94, 292 N.E.2d 790 (1973) 7

Commonwealth v. Ponton, 450 Pa. 40, 299 A.2d 634 (1973) 6

Commonwealth v. Scoggins, 451 Pa. 472, 324 A.2d 102 (1973) 6

Groshart v. United States, 392 F.2d 172 (9th Cir. 1968) ...7

Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980).....3

Lewis v. United States, 483 A.2d 1125 (D.C. App. 1984) 7

Lodowski v. State, 302 Md. 691, 490 A.2d 1228, *cert. granted and vacated*, 106 S.Ct. 1352, 89 L.Ed.2d 711, *on remand*, 513 A.2d 299, 307 Md. 233, *cert. denied*, 106 S.Ct. 1469, 89 L.Ed.2d 725 (1986) 7

Miranda v. Arizona, 384 U.S. 436 (1966).....4

People v. Bauer, 1 Cal.3d 368, 82 Cal. Rptr. 357, 461 P.2d 637 (1969), *cert. denied*, 400 U.S. 927, 91 S.Ct. 190, 27 L.Ed.2d 187 (1970) 6

People v. Handley, 446 N.Y.S.2d 790, 85 A.D.2d 910 (1981).....7

People v. McKinley, 42 Ill. App.3d 48, 355 N.E.2d 324 (1976), *affirmed*, 13 Ill. Dec. 13, 370 N.E.2d 1040, 69 Ill.2d 145 (1977), *cert. denied, McKinley v. Illinois*, 435 U.S. 976, 98 S.Ct. 1623, 56 L.Ed.2d 69 (1978) 7

TABLE OF AUTHORITIES

CASES: Page

People v. Newson, 417 N.Y.S.2d 264, 68 A.D.2d 377 (1979) 7

Smith v. State, 292 Ark. 162, 729 S.W.2d 5 (1987) 6

State v. Chambers, 682 S.W.2d 227 (Tenn. Cr. App. 1984) 6

State v. Green, 51 Haw. 260, 457 P.2d 505 (1969) 6

State v. Karcher, 252 Or. 564, 451 P.2d 110 (1969) 6

State v. Rodrique, 409 So.2d 556 (La. 1982), *appeal after remand*, 437 So.2d 830 (La. 1983) 7

State v. Russo, 67 Haw. 126, 681 P.2d 553 (1984), *appeal after remand*, 734 P.2d 156 (1987) 7

State v. Uganiza, 702 P.2d 1352 (Haw. 1985) 7

State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982) 7

Thomerson v. State, 274 Ark. 17, 621 S.W.2d 690 (1982) 5

Tosby v. United States, 451 F.2d 394 (8th Cir. 1971) 5

Trotter v. State, 290 Ark. 296, 719 S.W.2d 268 (1986) 5

CONSTITUTIONAL PROVISIONS

Fifth Amendment 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

STATE OF ARKANSAS ..... *Petitioner*

vs.

MICHAEL EUGENE MAYFIELD ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The State of Arkansas, the petitioner herein, petitions for a writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is reported as *Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987) and is reprinted as Appendix A to this petition.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on September 28, 1987. A petition for rehearing was not filed. On November 19, 1987, Justice Harry A. Blackmun entered an order extending the time for filing a petition for a writ of certiorari in this case to and including December 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

In 1985, Mayfield, the respondent, was convicted in the Circuit Court of Pulaski County, Arkansas of aggravated robbery. At trial, the respondent raised the issue now in question through a motion to suppress his statement. The trial court ruled against Mayfield and he was convicted.

Mayfield appealed the decision of the Pulaski County Circuit Court to the Supreme Court of Arkansas. The Supreme Court of Arkansas held that the *Miranda* warnings Mayfield had been given failed to inform him that he could have an attorney present even if he could not afford one. The Court relied heavily on the decision of *Harryman v. Estelle*, 616 F.2d 870 (5th Cir. 1980) in concluding that the *Miranda* warnings in this case were inadequate to fully apprise Mayfield of his rights.

The Arkansas Supreme Court has stayed its order, for ninety days, that Mayfield be retried or released pending disposition of this petition.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ARKANSAS SUPREME COURT'S RULING THAT MAYFIELD'S MIRANDA WARNINGS FAILED TO ADEQUATELY INFORM HIM THAT HE COULD HAVE AN ATTORNEY PRESENT EVEN IF HE COULD NOT AFFORD ONE IS INCONSISTENT WITH THE DECISIONS OF OTHER STATE COURTS AND THE DECISION OF THIS COURT IN PRYSOCK V. CALIFORNIA, 453 U.S. 355 (1981).

The Arkansas Supreme Court upheld Mayfield's claim, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), that the rights warning he received from the arresting officer did not adequately inform him of his right to have an attorney present even if he could not afford one.

The rights form in question provided that:

> "I have been advised that I am a suspect in a[n] aggravated robbery — theft of property, that I have the right to use the telephone, that I have the right to remain silent, *that I have the right to talk with an attorney, either retained by me or appointed by the court,* before giving a statement, and to have my attorney present when answering any questions." (emphasis added as to that part of the warning the Arkansas Supreme Court found deficient under *Miranda, supra.*)

The Arkansas Supreme Court relied heavily on *Harryman v. Estelle*, 616 F.2d 870 (5th Cir. 1980), a case in which the accused was questioned before any warning whatsoever had been given, in reaching its decision that the basic *Miranda* warnings must be followed rigidly. Pertinent parts of *Harry-*

man, supra, cited and relied on by the Arkansas Supreme Court were:

> "The rigidity of the *Miranda* rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength. . . . The decision's rigidity has afforded police clear guidance on the acceptable manner of questioning an accused. It has allowed courts to avoid the intractable factual determinations that the former totality of the circumstances approach often entailed."

Harryman v. Estelle, 616 F.2d at 873 and 874.

In addressing the issue in *Mayfield*, the Arkansas Supreme Court reviewed its own recent unsettled efforts in dealing with the issue at hand.

In *Thomerson v. State*, 274 Ark. 17, 621 S.W.2d 690 (1981), a case which was appealed from the same county and involved the exact same rights form and issue as the present case, the Court affirmed the appellant's conviction, citing *Tosby v. United States*, 451 F.2d 394 (8th Cir. 1971), for the proposition that the language of the warning may deviate from that used by the Supreme Court in *Miranda* as long as it did not negate the over-all effectiveness of the warning.

In *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986), the Arkansas Supreme Court dealt with the issue again. This time the Court held that a warning which told the accused that he was entitled to counsel *even if he could not afford one*, was insufficient because it did not tell the appellant that he could have an attorney "at absolutely no cost to him." *Id.* 290 Ark. at 276, 719 S.W.2d at 271.

A few months later the Arkansas Supreme Court addressed

the issue again in *Smith v. State*, 292 Ark. 162, 729 S.W.2d 5 (1987), reversed the strong language used in *Trotter, supra*, and approved a warning which said, "If you cannot afford a lawyer, one will be appointed for you, before any questioning, if you wish." *Id.* 292 Ark. at 166, 729 S.W.2d at 7. Approximately four months later the Arkansas Supreme Court reversed Mayfield's conviction for the reasons discussed above.

Although the Arkansas Supreme Court's decision in this case is *inconsistent* with the decisions of many other state courts[1] and this Court's decisions in *Prysock v. California*, 453

---

[1]In *State v. Green*, 51 Haw. 260, 457 P.2d 505, 507 (1969) interpreting *Miranda* as defendant has the right to consult with a lawyer, either *retained* or *appointed*, and to have a lawyer with him during interrogation (emphasis added); *People v. Bauer*, 1 Cal.3d 368, 82 Cal. Rptr. 357, 461 P.2d 637, 640 (1969), *cert. denied*, 400 U.S. 927, 91 S.Ct. 190, 27 L.Ed.2d 187 (1970), rejected defendant's argument that he should have been advised that if he could not afford an attorney, one would be appointed for him, since he was told if he was unable for any reason to obtain an attorney, one would be provided. This was held to be in compliance with *Miranda*; *State v. Karcher*, 252 Or. 564, 451 P.2d 110, 111 (1969). Although defendant had not been told that he was entitled to services of attorney at government expense if he was financially unable to secure one, statement by police to him that if he wanted an attorney to be present, one would be furnished to him was sufficient regarding *Miranda*; *Commonwealth v. Scoggins*, 451 Pa. 472, 324 A.2d 102, 105 (1973): defendant advised "you have the right to have the services of an attorney before you tell us anything." Court noted that although language not identical with *Miranda*, issue was whether the words employed sufficiently conveyed to appellant that he had constitutional right to assistance of counsel during police interrogation; *Commonwealth v. Ponton*, 450 Pa. 40, 299 A.2d 634, 635-636 (1973): warning "If you cannot afford to hire a lawyer, and you want one, we will see that you have a lawyer provided to you before we ask you any questions . . ." Court rejected defendant's contention that "free of charge" language was necessary under *Miranda; State v. Chambers*, 682 S.W.2d 227 (Tenn. Cr. App. 1984) the court relying on *California v. Prysock, supra*, stated that an officer is not required to give a verbatim recitation of the *Miranda* warning to avoid the pollution of

U.S. 355 (1981), it is consistent with other state courts who have addressed the issue.[2]

---

voluntary statements made by accused during questioning; *People v. Handley*, 446 N.Y.S.2d 790, 85 A.D.2d 910 (1981), defendant was advised at least twice that he was entitled to counsel and to have counsel assigned if necessary. He was also told he could call a lawyer if he wanted to and if he did the officer would wait for the attorney to come before they questioned him. The court found that this was sufficient under *Prysock, supra; State v. Vickers*, 291 S.E.2d 599, 306 N.C. 90 (1982). Supreme Court of North Carolina stated that *Miranda* required that a criminal suspect must be adequately informed of his constitutional rights, including the right to *retained* or *appointed* counsel (emphasis added); *Lodowski v. State*, 490 A.2d 1228, 302 Md. 691, *cert. granted and vacated*, 106 S.Ct. 1352, 89 L.Ed.2d 711, *on remand* 513 A.2d 299, 307 Md. 233, *cert. denied*, 106 S.Ct. 1469, 89 L.Ed.2d 725 (1986). Although the court did not cite the full warning in its opinion, the court did state that one of the warnings that must be given before questioning the accused, is that the person has a right to the presence of an attorney, either *retained* or *appointed*, (emphasis added); *State v. Rodrique*, 409 So.2d 556, *appeal after remand* 437 So.2d 830 (La. 1982), the court stated that *Miranda* requires that prior to any questioning, the accused must be informed that he has the right to remain silent, that any statement he does make may be used in evidence against him, and that he has the right to the presence of an attorney, either retained or appointed; *Burton v. State*, 292 N.E.2d 790, 260 Ind. 94 (1973). The defendant was advised that he had a right to have a lawyer present now, that he had a right to have an attorney at that time or at any time, and that if he so indicated he wanted an attorney the officers would stop and get him one. Supreme Court of Indiana found this essentially conveyed the *Miranda* message; *see also Lewis v. United States*, 483 A.2d 1125 (D.C. App. 1984).

[2]*Groshart v. United States*, 392 F.2d 172 (9th Cir. 1968); *People v. McKinley*, 355 N.E.2d 324, 42 Ill. App.3d 48 (1976), *affirmed* 13 Ill. Dec. 13, 370 N.E.2d 1040, 69 Ill.2d 145 (1977), *cert. denied, McKinley v. Illinois*, 98 S.Ct. 1623, 435 U.S. 976, 56 L.Ed.2d 69 (1978), when the defendant is not fully advised of his right to an attorney and told that one will be hired for him if he cannot afford one, failed because it did not fully advise the defendant of his right; *People v. Newson*, 417 N.Y.S.2d 264, 68 A.D.2d 377 (N.Y. 1979); *State v. Uganiza*, 702 P.2d 1352 (Haw. 1985); *State v. Russo*, 681 P.2d 553, 67 Haw. 126 (1984), *appeal after remand* 734 P.2d 156.

In *Prysock v. California, supra*, this Court recognized that the rights warning need not mimic the exact language this Court used in *Miranda*. As noted in footnote one, *supra*, several state court decisions are in compliance with the holding in *Prysock, supra*. Although the Arkansas Supreme Court correctly recites the holding set forth in *Prysock*, it clearly did not follow that holding in deciding that Mayfield's warning did not adequately comply with the rigid standard of *Miranda*.

In *Commonwealth v. Wood*, 219 Pa. Super. 35, 275 A.2d 859, 860 (1971), the form in question read "If you cannot afford to hire a lawyer, and you want one, we will see that you have a lawyer provided to you, before we ask you any questions." Citing *Miranda*, the Pennsylvania court held that words "free counsel" need not be used. The court further stated that "We have not yet come to the point where an arresting officer must assume that all accused are both indigent and morons and language which is both clear and unambiguous, using words in everyday use by persons of every level of intelligence, should be sufficient to meet the requirements of the law." *Id.* 275 A.2d at 860.

As other courts have noted and as the dissent so notes in this case, at no time did the respondent allege that he was misled by the wording of the warning or left in doubt as to his right to be represented by a lawyer.

The State submits that the petition for certiorari should be granted because the Arkansas Supreme Court's holding in *Mayfield* was too rigid in light of this Court's ruling in *Prysock*, and that the Arkansas Supreme Court clearly failed to give the words used in Mayfield's rights warning their clear and unambiguous everyday meaning.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN STEVEN CLARK
Arkansas Attorney General

BY: WILLIAM FRED KNIGHT
Assistant Attorney General
201 EAST MARKHAM STREET
HERITAGE WEST BUILDING
LITTLE ROCK, ARKANSAS 72201
(501) 371-2007

Counsel for Petitioner

APPENDIX A

SUPREME COURT OF ARKANSAS

Michael Eugene MAYFIELD *v.* STATE of Arkansas

CR 87-60

Opinion delivered September 28, 1987

Appeal from Pulaski County Circuit Court, Fifth Division (CR 85-1749); *Jack L. Lessenberry,* Circuit Judge; reversed.

DAVID NEWBERN, Justice. The appellant, Michael Eugene Mayfield, was convicted of aggravated robbery. He contends the trial court erred in failing to suppress a statement he made while in police custody because the rights warning he was given failed to inform him that he could have an attorney present even if he could not afford one. We agree that the warning he was given was insufficient to comply with the requirements set forth in *Miranda v. Arizona,* 384 U.S. 436 (1966), and thus we must reverse the conviction. We disagree with the appellant's further contention that the jury was improperly instructed as to the minimum sentence with which he was charged. We discuss the latter point to give direction in the event there is a retrial.

Acting upon information he received in investigating a crime, not the subject of this appeal, Detective Jones of the Little Rock Police Department arrested the appellant for the robbery of an Arby's store. At police headquarters Jones testified he read the appellant his rights from "the standard Little Rock Police rights form." The form used was introduced into evidence at the appellant's trial. It provides, in pertinent part:

"I have been advised that I am a suspect in a[n]

> aggravated robbery-theft of property, that I have the right to use the telephone, that I have the right to remain silent, that I have the right to talk with an attorney, either retained by me or appointed by the Court, before giving a statement, and to have my attorney present when answering any questions."

After having signed the rights form, the appellant signed a further statement that he waived his rights and voluntarily made a statement. His statement was a detailed confession to having participated in the robbery with which he was then charged.

In a hearing before the trial, the appellant moved to suppress the confession on the ground that the warning did not comply with the requirements stated in *Miranda v. Arizona, supra*. He renewed the objection at the trial when the confession was introduced. The state presented no evidence against the appellant other than the confession. The appellant was convicted and sentenced to imprisonment for ten years which the court had instructed the jury to be the minimum sentence for the offense charged.

1. The warning

In *Thomerson v. State*, 274 Ark. 17, 621 S.W.2d 690 (1981), which was also an appeal from a Pulaski County Circuit Court, the advice given the appellant was apparently precisely the same as in the case before us now. The words quoted from the rights warning form in that case are the same as those here. As in this case, Thomerson challenged his conviction on the basis that he had not been informed of his right to counsel even if he were indigent or could not afford an attorney. We affirmed the conviction, citing *Tasby v. U.S.*, 451 F.2d 394 (8th Cir. 1971), for the proposition that the language of the warning may deviate from that used by the Supreme Court in the

Miranda case as long as it "does not negate the over-all effectiveness of the warning." We then discussed the familiar "totality of the circumstances" test for determining the voluntariness of the confession and in the process of that discussion noted that it would be better for the police to inform an accused of his right to counsel without cost. Our opinion in the *Thomerson* case spoke not at all about whether the effectiveness of the warning had indeed been subverted except in the context of discussing the voluntariness of the confession.

Our error in the *Thomerson* case lay in confusing the threshold requirement of a warning with the requirement that a confession, given after a warning, be made voluntarily and upon waiver of the rights of which the accused has earlier been apprised. In *Harryman v. Estelle*, 616 F.2d 870 (5th Cir. 1980), an accused was asked a question before any warning whatever had been given, and he gave an incriminating answer. It was argued that the initial question was more of an exclamation by the police officer than a question, and thus in the circumstances the interrogation was not the kind of police questioning the Supreme Court had intended to control in the *Miranda* case. In response, the Court said:

> This argument misunderstands *Miranda*. Prior to *Miranda*, the Supreme Court attempted to protect an accused from improper police questioning by holding inadmissible statements that appeared to have been involuntary in light of the totality of their surrounding circumstances, including the characteristics of the accused and the details of the interrogation. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973); *Spano v. New York*, 360 U.S. 315, 321 n.2, 79 S.Ct. 1202, 1206, 3 L.Ed.2d 1265 (1959) (citing 28 cases). Were we to follow such an approach here, we might well find that Harryman's statement was voluntary and therefore properly admitted.

But in *Miranda*, the Court found the totality of the circumstances approach inadequate. Recognizing that in-custody questioning has inherently coercive tendencies, the Court adopted in its place a set of rigid procedural rules. It held that until these rules have been followed, and an accused has been adequately informed of and waived his rights, he may not be questioned. If he is questioned, any statements he makes in response cannot be presented by the prosecution as part of its proof at trial. 384 U.S. at 444-91, 86 S.Ct. at 1612-36. *See Michigan v. Tucker*, 417 U.S. 433, 443-44, 94 S.Ct. 2357, 2363, 41 L.Ed.2d 182 (1974).

The rigidity of the *Miranda* rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength. *E.g., Tague v. Louisiana*, ___ U.S. ___, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980); *Miranda v. Arizona*, 384 U.S. at 479, 86 S.Ct. at 1630. *See also Fare v. Michael C.*, 439 U.S. 1310, 1314, 99 S.Ct. 3, 5, 58 L.Ed.2d 19 (1978) (Rehnquist, J., on application for stay) (calling rigidity of *Miranda* its "core virtue"). The decision's rigidity has afforded police clear guidance on the acceptable manner of questioning an accused. It has allowed courts to avoid the intractable factual determinations that the former totality of the circumstances approach often entailed. When a law enforcement officer asks a question of an accused and the accused, without the benefit of *Miranda*'s safeguards, answers, the totality of the circumstances is irrelevant. The accused's answer is simply inadmissible at trial as part of the prosecution's case in chief. [616 F.2d 870 at 873, 874]

The conviction was affirmed on the basis of the Court's determination that the error was harmless due to other overwhelming evidence of guilt beyond a reasonable doubt. In

the case before us now, the only evidence against the appellant was his confession.

While we continue to use the "totality of the circumstances" to test the voluntariness of a confession, *see Smith v. State*, 292 Ark. 162, 729 S.W.2d 5 (1987) and *Stone v. State*, 290 Ark. 204, 718 S.W.2d 102 (1986), we will not look beyond the warning given to ascertain if the accused knew what his rights were when the confession was made. That is the specific mandate of the Supreme Court in the *Miranda* case and in *Prysock v. California*, 453 U.S. 355 (1981) as well.

In *Trotter v. State*, 290 Ark. 296, 719 S.W.2d 268 (1986), we took too far the admonition we had given in the *Thomerson* case. There we said a warning which had told the accused he was entitled to counsel even if he could not afford one was insufficient because it did not say he could have an attorney at absolutely no cost to him. We affirmed the conviction because there was evidence that the sheriff had gone beyond the reading of the rights form we found to be inadequate and had in fact informed the accused he was entitled to counsel without charge. In *Smith v. State, supra*, we took back our strong language from the *Trotter* case, and we approved a warning which said, "If, you cannot afford a lawyer, one will be appointed for you, before any questioning, if you wish." We noted that in three of the four parts of the *Miranda* case opinion in which the Supreme Court discusses what the warning must be, the language having to do with indigency or "if he cannot afford one" was used. The clear implication was that, while we require that an accused person be told that if he is indigent or cannot afford a lawyer the court will appoint one, there are no "magic words" which have to be used, such as "absolutely without cost to you."

We have no doubt whatever that at the heart of the Supreme Court's opinion is its concern that the indigent

accused in police custody be informed that he has just as much right to representation by an attorney as a person who can afford one. The Supreme Court said in the *Miranda* case:

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent — the person most often subjected to interrogation — the knowledge that he too has a right to have counsel present. [436 U.S. at 473]
>
> . . . . .
>
> He must be warned prior to any questioning that he has the right to the presence of an attorney, *and that if he cannot afford an attorney one will be appointed* for him prior to any questioning if he so desires. [384 U.S. at 479, emphasis supplied.]

In *California v. Prysock, supra,* the Supreme Court noted that while the warning need not mimic the language of the *Miranda* decision, it must effectively get across to the accused the right to have retained counsel or appointed counsel if the accused cannot afford an attorney. In the *Prysock* case the Supreme Court reversed a California decision which had held the warning given an accused was insufficient because it did not follow precisely the language used in the *Miranda* decision. The Court said, ". . . *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures. . . ." (453 U.S. at 359), but in considering

whether the information required by the *Miranda* case was given the accused, the Court said:

> It is clear that the police in this case fully conveyed to respondent his rights as required by *Miranda*. He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one. These warnings conveyed to respondent his right to have a lawyer appointed *if he could not afford one prior to and during the interrogation*. [453 U.S. at 361, emphasis added.]

The warning given in the case before us did not convey to the appellant the fact that he could have a lawyer free of charge. To do that the warning must make some reference to the indigency of the person being warned in connection with informing him that an attorney will be appointed for him. While we are not holding that specific words are required, we suggest it would be very simple for the warning to say that the person being warned has the right to have an attorney present and that he may either retain one himself or, if he cannot afford one, have one appointed by the court.

2. The instruction

The trial court instructed the jury that the minimum sentence for aggravated robbery was ten years imprisonment. The appellant contends that was error because the minimum sentence for that offense is six years. The contention of the appellant is based upon Ark. Stat. Ann. §41-2102(3)(a) (Supp. 1985) which says, "Upon pleading guilty or being found guilty the first time of aggravated robbery with a deadly weapon, such person shall be imprisoned for no less than six (6) years." The instruction, and the State's position here, is based on subsection (2) of that statute which says, "Aggravated robbery is a class Y felony." Ark. Stat. Ann. §41-901 (Supp. 1985)

provides that a defendant convicted of a class Y felony shall be sentenced to not less than ten years and not more than forty years, or life.

We agree with the State's position on this point. Section 2102 of Act 280 of 1975 made aggravated robbery a class A felony with no further specification as to punishment. In 1979, the general assembly passed Act 1118 amending §2102 of Act 280 of 1975 to provide:

> (2) Except as provided in subsection (3) below, aggravated robbery is a Class A felony.

Subsection (3) then provided the specific penalties which are now contained in Ark. Stat. Ann. §41-2102(3), the first of which provides:

> (a) Upon pleading guilty or being found guilty the first time of aggravated robbery with a deadly weapon, such person shall be imprisoned for not less than six (6) years. . . .

In 1981, the general assembly adopted Act 620, §13 of which provided:

> Subsection (2) of Section 2102 of Act 280 of 1975, the same being Arkansas Statute §41-2102(2), is hereby amended to read as follows: "(2) Aggravated robbery is a class Y felony."

The general assembly thus made the offense a class Y felony and abolished the exception for subsection (3) of Act 280 of 1975 as amended by Act 1118 of 1979. This brought into conflict subsections (2) and (3) of the statute as it is presently codified. Subsection (2) makes aggravated robbery a class Y felony without exception. Subsection (2) was enacted subse-

quent to the provisions of subsection (3). Section 18 of Act 620 of 1981 provided, "All laws and parts of laws in conflict with this Act are hereby repealed." Subsection (2) was in §13 of that Act, thus subsection (3) has been repealed. While we might simply say that the later of two conflicting acts will be considered to have repealed the former, *see Price v. State*, 284 Ark. 148, 685 S.W.2d 506 (1985), we need not rely on that doctrine in view of the repealer clause.

Reversed.

Hickman and Hays, JJ., dissent.

STEELE HAYS, Justice, dissenting. If this appellant were misled by the wording of the *Miranda* warning as given in this case and left in doubt as to his right to be represented by a lawyer, I might agree with the majority. But he makes no such claim. In *Thomerson v. State*, 274 Ark. 17, 621 S.W.2d 690 (1981), the same argument now made was considered on an *identical* set of facts, and unanimously rejected. I believe we should adhere to our recent precedent.